

KEEPING CURRENT

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No reasonable cause of action for alleged defamation protected by absolute privilege (*Lopinski v. Raji*)

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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Regular followers of my blogs will probably have recognized that they often feature defamation cases and decisions rendered on anti-SLAPP motions. An anti-SLAPP motion (available in Ontario under [section 137.1](#) of the [Courts of Justice Act](#) and in British Columbia under the [Protection of Public Participation Act](#), SBC 2019) provides a defendant with the opportunity to have a plaintiff's action dismissed at an early stage of the proceedings. However, there are other procedural rules which permit a defendant to achieve the early dismissal of a defamation action. Accordingly, particularly in those provinces that do not have anti-SLAPP legislation, and even in Ontario and British Columbia, it is important for a defendant to know which rules can be used to achieve the early dismissal of a plaintiff's defamation action without the need to incur potentially significant costs defending it.

In [Lopinski v. Raji, 2024 SKKB 15](#), one of those rules, dismissal for the claim disclosing no reasonable cause of action, was used by a defendant to achieve the early dismissal of the plaintiffs' action for breach of fiduciary duty, breach of

the [Criminal Code](#), breach of the [Charter of Rights and Freedoms](#), and defamation.

The plaintiffs were involved in a child protection dispute in which the female plaintiff's child had been apprehended under [The Child and Family Services Act](#) (Saskatchewan).

The plaintiffs felt aggrieved and accordingly commenced an action against the two child protection workers involved in the apprehension and the lawyer for the Ministry of Social Services who handled the child protection hearing.

The claim against the lawyer, more specifically, included allegations related to the lawyer's preparation of an affidavit that was filed in the child protection proceedings. The lawyer contended that these allegations disclosed no reasonable cause of action because the affidavit was made in a judicial proceeding and its contents were protected by the principle of absolute privilege.

Under rule 7-9 of Saskatchewan's [The Queen's Bench Rules](#), a court can strike a pleading that discloses no reasonable claim or defence. There is a similar

rule in Ontario (and the other provinces and territories). In Ontario, a court has the authority to strike a pleading that discloses no reasonable claim or defence under [rule 21](#) of the [Rules of Civil Procedure](#).

In Saskatchewan, and again in Ontario and the other Canadian common law provinces and territories, on a motion to strike a claim for disclosing no reasonable cause of action, the following principles generally apply:

- the claim should be struck where, assuming the plaintiff proves everything alleged in the claim there is no reasonable chance of success;
- the jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt;
- the court may consider only the claim, particulars furnished pursuant to a demand, and any document referred to in the claim upon which the plaintiff must rely to establish its case;
- the court can strike all, or a portion of the claim; and
- the plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action.

The court agreed that the plaintiffs' claim for defamation against the lawyer clearly disclosed no reasonable cause of action based on well-established law.

A defamatory statement made on an occasion that is covered by absolute privilege does not give a plaintiff a right to claim damages. With respect to matters before the court, the absolute privilege attaches to statements made in the

course of judicial proceedings, statements made in the course of quasi-judicial proceedings, and statements contained in documents made in judicial or quasi-judicial proceedings.

In an older Ontario case, the court stated:

No action will lie for defamatory statements made or sworn in the course of a judicial proceeding before any Court of competent jurisdiction...This defence of absolute privilege applies to statements in the writ, in the pleadings, and in affidavits, as well as to statements made by the Judge, counsel, and witnesses in open Court.

In [1522491 Ontario Inc. v. Stewart, Esten Professional Corp., 2010 ONSC 727](#), Justice Karakatsanis (as she then was) stated that absolute privilege in the litigation context applies to statements made on occasions that are preparatory, preliminary, intimately connected, necessary or incidental to the institution of proceedings provided the communications on such occasions are intimately connected to the litigation.

Absolute privilege is an impenetrable defence.

Although the decision does not clearly state whether the plaintiffs raised malice in the lawyer's preparation of the affidavit, such an argument would have been irrelevant because the absolute privilege defence extends to false and malicious statements.

While in a defamation action, malice defeats the defences of fair comment, qualified privilege and responsible communication on matters of public interest, the court noted that malice does not provide an exception to the application of absolute privilege.



In [Royal Crown Academic School Inc. v. Wu, 2017 ONSC 7295](#), the court explained that where absolute privilege applies, no action can be brought regardless of whether the words were written or spoken maliciously, without justification or excuse, or negligently.

This case, among other things, is instructive on the law of absolute privilege and demonstrates that a defendant will be able to obtain the early dismissal of a defamation action for statements made on an occasion of absolute privilege. This case also shows that prospective plaintiffs would be wise to obtain legal advice before commencing an action for alleged defamatory statements made in the litigation context. Although the court awarded no costs against the self-represented plaintiffs in the circumstances of this case, the usual costs awards in a case is that the loser pays a portion of the winner's costs.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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